HENRY WONG v. JOHN LEE & ANOR.*

[O.C.J. (Yusoff J.) April 18, 1980]
[Kuching Civil Suit No. K 186 of 1970]

Torts — Libel — Damages — Principles applied by court.

The plaintiff in this case claimed that the letter written by the first defendant to the plaintiff concerning the plaintiff was libellous. The first defendant, a fellow employee in the second defendant's firm had written, "please be advised that our Managing Director, Mr. G. Creighton and other Directors in Head Office have expressed dissatisfaction that you have a shady reputation which is not within the policy of the company to retain and or engage such staff. Your general attitude towards your work as well as the unsatisfactory turnover which you produced after your return to Kuching will not justify your assumption that we would consider retrenchment in your case on the basis of 'First in, first out'." Copies of the said letter dated June 23, 1980 were sent to the Sarawak Commerical Employees' Union, the Managing Director of the second defendant (Mr. G. Creighton) and also to the Secretary/Accountant of the second defendant.

On October 8, 1970 counsel for the plaintiffs wrote to the first and second defendants asking them for apology and retraction and also for compensation. Both defendants denied that the letter dated June 23, 1970 was libellous and refused to apologise. The defendants pleaded qualified privilege. Counsel for the first defendant contended that the first defendant was provoked by the plaintiff's letter of June 22, 1970 in accusing the first defendant of abusing his authority to retrench staff not on the basis of "First in, first out" and that faced with such provocation the first defendant was under a duty to make a reply to the charges raised against the defendants.

Held, allowing the plaintiff's claim: (1) a person whose character has been attacked has a right to defend himself against such attack and any defamatory statement he made in answer to such attack is privileged, provided they are published *bona fide* and are fairly relevant to the accusations made;

(2) in the present case, after having answered the plaintiff's allegation regarding retrenchment, the first defendant proceeded to counter-charge the plaintiff alleging that the plaintiff had a shady reputation. The counter-charge made by the defendant exceeded the exigency of the occasion. The words were published by the first defendant recklessly without an honest belief in their truth with the intention of insulting the plaintiff and in publishing those words the first defendant was actuated by malice;

(3) the general rule is that damages are to be assessed on a compensatory basis, that is compensation for the harm caused to the plaintiff by the wrongful act. In tort, the plaintiff can be awarded additional damages called 'aggravated damages to compensate him for his injured feelings';

(4) a sum of $50,000 was a fair and reasonable compensation for this serious libel.

Cases referred to:-

(1) *Adam* v. *Ward* [1916-17] All E.R. Rep. 157.
(2) *Laughton* v. *Bishop of Sodor & Man* (1872) L.R. 4 P.C. 495.
(3) *Turner* v. *M.G.M.* [1950] 1 All E.R. 449.
(4) *Citizens' Life Co.* v. *Brown* [1904] A.C. 423.
(5) *Thompson v. Nye* (1850) 16 Q.B. 175.

CIVIL SUIT.

T.O. Thomas for the plaintiff.

John Ko for the defendants.

Cur. Adv. Vult.

Yusoff J.: This is a claim for defamation. The plaintiff alleged that he was libelled by the 1st defendant, a fellow employee in the 2nd defendant's firm who wrote a letter to the plaintiff concerning the plaintiff. Copies of the letter (Exhibit P1) dated June 23, 1970, were sent to the Sarawak Commercial Employees' Union, the Managing Director of the 2nd defendant (Mr. G. Creighton) and also to the Secretary/Accountant of the 2nd defendant. The offending words in the letter are as set out in paragraph 2 of the statement of claim viz.:

"Please be advised that our Managing Director, Mr. G. Creighton and other Directors in Head Office have expressed dissatisfaction that you have a shady reputation which is not within the policy of the company to retain and or engage such staff. Your general attitude towards your work as well as the unsatisfactory turnover which you produced after your return to Kuching will not justify your assumption that we would consider retrenchment in your case on the basis of "First in, first out."

The plaintiff contended that there were two counts of libel in paragraph 2 of the letter dated June 23, 1970:

Firstly, it was said that the plaintiff was a person of shady reputation; and

Secondly, the plaintiff was accused of inefficiency in his office as a commercial employee.

On October 8, 1970 the plaintiff's advocate wrote to the 1st and 2nd defendants asking them for apology and retraction and also for compensation (Exhibit AB6 and 7). Both defendants denied that the letter dated June 23, 1970 was libellous and refused to apologise (Exhibit AB8). A writ was taken by the plaintiff within the month. The defendants' counsel conceded that paragraph 2 of the letter could support an action for defamation but as pleaded in the statement of defence contended that the words were published on an occasion of qualified privilege to the parties receiving the letter on a matter of common interest.

In his submission, the defendants' counsel submitted that the 1st defendant was provoked by the plaintiff's letter of June 22, 1970 in accusing the 1st defendant of abusing his authority to retrench staff not on the basis of "First in, first out." (Exhibit AB4) and that faced with such provocation the 1st defendant was under a duty to make a reply to the charges raised against the defendants. He referred to *Adam* v. *Ward;*[1] *Laughton* v. *Bishop of Sodor & Man*[2] and *Turner* v. *MGM*[3] as his authority.

The plaintiff's letter dated June 22, 1970 is reproduced as hereunder:

Kuching, 22nd June, 1970.

The Branch Manager,
N.B.T.,
KUCHING

Dear Sir,

I refer to our recent conversation on the subject of retrenchment on Import Salesman. You have indicated that the Company wish to retrench me. If this is anticipated before I am transferred back from Miri on April 16th, then I would have acccepted the 3 months ex-gratia pay. On the contrary I have accepted the offer to be transferred back to Kuching branch to my previous post as a Salesman. How you have abused your authority to retrench staff not on the basis of 'first in first out'. Would the Union please look into this matter and clarify?

Yours faithfully,
Sgd.
HENRY WONG JAN FOOK.

c.c. Managing Director, K.K.
Secretary, SCEU, Kuching."

* Appeal to Federal Court allowed on October 13, 1980.

The retrenchment referred to in the plaintiff's letter involved himself and another salesman who held the vacancy in Kuching when he was posted to Miri in September 1969.

I have considered the cases referred to by the defendants' counsel. They deal with the principle when an occasion is privileged. In *Adam* v. *Ward* (*ibid*) Lord Finlay L.C. at 162 said:

"The law of privilege is well settled. Malice is a necessary element in an action for libel, but from the mere publication of defamatory matter malice is implied, unless the publication were on what is called a privileged occasion. If the communication were made in pursuance of a duty or on a matter in which there was a common interest in the party making and the party receiving it, the occasion is said to be privileged. This privilege is only qualified, and may be rebutted by proof of express malice. It is for the judge, and the judge alone, to determine as a matter of law whether the occasion is privileged, unless the circumstances attending it are in dispute, in which case the facts necessary to raise the question of law should be found by the jury."

The defendants' main defence is provocation. In law a person whose character has been attacked has a right to defend himself against such attack and any defamatory statement he made in answer to such attack is privileged, provided they are published *bona fide* and are fairly relevant to the accusations made. In *Turner* v. *MGM Pictures Ltd.* (*ibid*) Lord Oaksey said:

"There is, it seems to me, an analogy between the criminal law of self defence and a man's right to defend himself against written or verbal attacks. In both cases he is entitled, if he can, to defend himself effectively, and he only loses the protection of the law if he goes beyond defence and proceeds to offence. That is to say, the circumstances in which he defends himself, either by acts or by words, negative the malice which the law draws from violent acts or defamatory words. If you are attacked with a deadly weapon you can defend yourself with a deadly weapon or with any other weapon which may protect your life. The law does not concern itself with niceties in such matters. If you are attacked by a prize fighter you are not bound to adhere to the Queensberry rules in your defence. The 'Lion's Roar' was probably not as far-reaching as the appellant's voice of the B.B.C. wireless, nor could the respondents, so far as the evidence shows, command so pointed a pen as that of the appellant. They had, therefore, to adopt other means of defence, but provided that they were means of defence and not of offence or attack, they are not evidence of malice, but merely the adoption of the most effective method of defence available."

In the present case, after having answered the plaintiff's allegation regarding retrenchment, the 1st defendant proceeded to counter-charge the plaintiff alleging that the plaintiff had a shady reputation. This is no answer to an accusation of abuse of authority made by the plaintiff against him and it was not published *bona fide*. In my view, the counter-charge made by the defendant exceeded the exigency of the occasion. The words were published by the 1st defendant recklessly without an honest belief in their truth with the intention of insulting the plaintiff and in publishing those words the 1st defendant was actuated by malice.

In *Citizens' Life Co.* v. *Brown*[4] referred to in *Gatley* on Libel and Slander 7th Ed. paragraph 877 it is stated that where an agent or servant, acting within the scope and in the course of his employment, publishes a libel on a privileged occasion, and it is proved that the agent or servant was actuated by malice, the principle or master is liable. There is no denying that the 1st defendant was a servant or agent of the 2nd defendant's firm when he wrote the letter of June 23, 1970. He signed the letter as manager and the letter was written on the stationery of the 2nd defendant's letter-head showing that he was acting within the scope and in the course of the 2nd defendant's authority. In this situation the dishonesty or malice on the part of the 1st defendant is imputable to his principal, the 2nd defendant.

Lastly, a communication is not privileged merely because it is marked 'Private and Confidential' — see *Gatley* 7th Ed. paragraph 504 and note (89).

I will now deal with the claim for damages. The general rule is that damages are to be assessed on a compensatory basis, that is compensation for the harm caused to the plaintiff by the wrongful act. In tort, the plaintiff can be awarded additional damages called 'aggravated damages to compensate him for his injured feelings.' As stated in 12 *Halsbury's* Laws of England, 4th Ed. paragraph 1189:

"Aggravated damages in tort. In actions in tort, where the damages are at large, the court may take into account the defendant's motives, conduct and manner of committing the tort, and, where these have aggragated the plaintiff's damage by injuring his proper feelings of dignity and pride, aggravated damages may be awarded. The defendant may have acted with malevolence or spite or behaved in a high-handed, malicious, insulting or aggressive manner. The court may consider the defendant's conduct up to the conclusion of the trial, including what he or his counsel may have said at the trial."

In the present case there are factors which aggravates the damages. There has been an offer for retraction but the defendants refused to retract or apologise for the words they had published. Instead the plaintiff was further defamed by alleging that he was dismissed from his services with the 2nd defendant (Exhibit D3). This letter was written by the defendants' counsel in reliance to the defendants' letter of August 27, 1970 (not produced). There has also been persistent attempt by the defendant to justify the libel for a period of seven years which was later abandoned in September 1977. This conduct of the defendants before trial is relevant in assessing damages — paragraph 1261 *Gatley* 6th Edition.

In the notice of evidence in mitigation of damages, the defendants referred to the following matters on which evidence were led.

1. *Provocation* — The provocation was not immediate. The plaintiff's letter accusing the 1st defendant of abusing his authority was written on June 22, 1970 and he wrote the offending letter on June 23, 1970. There was sufficient time lapsed for the defendant to sleep over the provocation before he signed the letter.
2. *The plaintiff's work was unsatisfactory.* Evidence was led to show the misconduct of the plaintiff by producing letters (Exhibit D2 & D3) alleging misappropriation of money by the plaintiff. These letters dated September 9, 1971 and August 29, 1970 respectively, were subsequent to the time of publication of the libel. Evidence of bad character subsequent to that time is not admissible in mitigation of damages — *Thompson* v. *Nye*;[5] paragraph 1337 *Gatley* 6th Ed.

3. *Civil Suit where defendants successfully recovered $3760 from plaintiff (Exhibit D4).* This was a judgment given against the plaintiff on August 17, 1972. There is nothing in that proceeding to show the misconduct of the plaintiff. In any event the proceeding took place after the publication of the libel and is again not relevant — *Duncan & Neill* on Defamation at 137 paragraph 18.16.

In assessing this damage I take into consideration that the plaintiff was an average salesman earning a salary of $250 per month including commissions earned. He was a man of good reputation and that consequent to the libel published against him, causing him injured feelings, his reputation has also been affected in some degree for the last ten years. I have also considered the trend of present inflation. In these circumstances, in my view a sum of $50,000 is a fair and reasonable compensation for this serious libel.

There is no evidence showing that the plaintiff's loss of employment opportunities was the direct result of this libel. There is therefore no special damage awarded.

In the result there will be judgment for the plaintiff with costs.

Claim allowed.

Solicitors: *Thomas & Co.; Battenberg & Talma.*

PUBLIC PROSECUTOR v. HA JONG RU

[A.Cr.J. (Tan Chiaw Thong J.) May 13, 1980]
[Sibu — Criminal Appeal No. 3 of 1980]

Gaming — Lottery tickets — Possession — Respondent caught riding bicycle with bicycle bag containing lottery tickets or record of stakes — Burden of proof on prosecution to prove possession — Criminal Procedure Code, s. 173(f) & (h) — Gambling Ordinance (Cap. 138), s. 4(c).

Criminal Law and Procedure — Possession of gambling documents — Burden of proof on prosecution — Prosecution to establish case "beyond all reasonable doubt" — Criminal Procedure Code, s. 173(f) & (h) — Gambling Ordinance (Cap. 138), s. 4(c).

The respondent in this case was charged in the lower court for assisting in carrying on a public lottery contrary to section 4(d) of the Gambling Ordinance (Cap. 138). The facts revealed that two police officers, *M.* & *T.* were lying in wait for the respondent who came on a bicycle from the direction of Sungei Merah. On seeing her *M.* came out of his ambush position and stopped her. The respondent refused to stop and *M.* gave chase. Having finally stopped her, he identified himself as a police officer and the respondent still tried to escape. He gave chase and finally caught up with her. At that time, the respondent was shivering and looked pale. *M.* made a check of the bicycle bag and found in it documents which seemed to be either lottery tickets or a record of stakes or wages in relation to a lottery.

The lower court at the end of the case for the prosecution acquitted and discharged the respondent because it found that possession had not been proved by the prosecution against her. The prosecution appealed against the lower court's decision.

Held, dismissing the appeal: (1) there is no presumption of possession contained in the Gambling Ordinance against an accused person. It falls squarely upon the prosecution to prove possession against the accused;

(2) there was no evidence to indicate that the respondent had the sole custody and control of the bicycle including the bicycle bag;

(3) bearing in mind the strict proof of possession required of the prosecution, the lower court was right in holding that the prosecution had not succeeded in proving possession against the respondent.

Cases referred to:-

(1) *Chan Pean Leon* v. *Public Prosecutor* [1956] M.L.J. 237, 239.

(2) *Public Prosecutor* v. *Foo Jua Eng* [1966] 1 M.L.J. 197.

(3) *Tan Seng Chay & Anor.* v. *Public Prosecutor* Kota Bharu Criminal Appeal No. 9 of 1968 *(unreported)*.

(4) *Public Prosecutor* v. *Omar Lopez* [1967] 2 M.L.J. 281.

(5) *Tan Ah Ting* v. *Public Prosecutor* [1974] 2 M.L.J. 37.

[Editorial Note: The learned judge held that *Public Prosecutor* v. *Omar Lopez* was no longer authority on the test as to what constitutes a *prima facie* case against an accused person in the light of the existing Criminal Procedure Code.]

CRIMINAL APPEAL.

Abdul Khalid bin Manaff (Deputy Public Prosecutor) for the appellant.

Robin Hii for the respondent.

Cur. Adv. Vult.

Tan Chiaw Thong J.: This is an appeal by the Public Prosecutor against the order of acquittal of the respondent by the lower court on a charge alleging that the respondent had assisted in carrying on a public lottery contrary to section 4(c) of the Gambling Ordinance (Cap. 138).

The facts are simple and are as follows. At about 2.00 p.m. on November 7, 1976, as a result of instruction from his superior officer, PW1 Corporal Mohd. Hasbie together with a P.C. Tawau lay in wait along Queensway (Jalan Tun Haji Openg) near the R.T.M. Building for the respondent who later came on a bicycle from the direction of Sg. Merah. On seeing her, PW1 came out of his ambush position and stopped her. The respondent refused to stop and PW1 gave chase. Having finally stopped her, he identified himself as a police officer and the respondent still tried to escape. He gave chase and finally caught up with her about 10 yards away. At that time, the respondent was shivering and looked pale. PW1 made a check of the bicycle bag and found in it documents which, on the evidence given by PW3 Inspector Anthony Chee, it would seem clear to be either lottery tickets or are a record of stakes or wagers in relation to a lottery.

The sole issue raised in this appeal is the question as to whether in the circumstances as disclosed in the evidence in the lower court, it can be said that the respondent was in possession of the documents found by PW1 in the bicycle bag. It was submitted by the learned Deputy Public Prosecutor that on the evidence adduced by the prosecution the facts showed that the respondent was in possession of these documents. He pointed out that the circumstances as to the finding of these documents and the conduct of the respondent pointed to this conclusion. Learned counsel for the respondent contended otherwise and argued that the prosecution had adduced no evidence of the ownership and use and control of the bicycle and